Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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Petitioner's valid causes of action setting forth compensatory damages were dismissed as preempted by a ruling that could not occur if this Court's preemption rulings were followed. The Illinois Courts should not be allowed to disregard the rulings of this Court on preemption, thus denying all who would rely upon the Illinois Courts the benefit of those rulings, contrary to that which is available in other states and jurisdictions.

QUESTIONS PRESENTED

Whether the Illinois Courts erred in holding, in conflict with this Court, other courts of appeal and other state courts construing identical preemptive language, that the statutory language of the Electronic Products Radiation Control Act, 21 U.S.C. § 360kk *et seq.* preempts Petitioner's state law causes of action?

Does the mere existence of a general empowerment clause in the Electronic Products Radiation Control Act, 21 U.S.C. § 360kk *et seq.* negate the Act's preemption clause which preserves non-conflicting state laws?

Are there different preemption rules depending on whether the compensable injury is personal injury or economic injury?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I.

THIS COURT HAS REVIEWED IDENTICAL PREEMPTION LANGUAGE IN OTHER FEDERAL STATUTES AND HELD THAT STATE CLAIMS WERE NOT PREEMPTED 6

II.

ANALYSIS OF THE PREEMPTION LANGUAGE OF THE EPRCA REVEALS NO CONGRESSIONAL INTENT TO PREEMPT STATE LAWS WHICH DO NOT CONFLICT WITH A FEDERAL STANDARD 9

A. FEDERAL REGULATION OF PRODUCTS EMITTING RADIATION IS NOT EXCLUSIVE 10

B. FEDERAL STATUTES WITH SIMILAR LANGUAGE AND MEANING HAVE BEEN CONSTRUED AGAINST PREEMPTION OF STATE LAW CLAIMS 11

C. THERE IS NO IMPLIED PREEMPTION OF THESE CAUSES OF ACTION 13

1. The Appellate Court Erred by Implying Preemption From the General Purpose of the Act 13

2. The Lack of Federal Regulation Does Not Imply An Affirmative Decision That No Regulation is Necessary or Required 15

III.

THE SAVINGS CLAUSE PRESERVES PETITIONER'S CLAIMS 16

CONCLUSION 17

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases PAGE(S)

Baltimore and Ohio Railroad v. Oberly, 832 F.2d 108 (3rd Cir. 1988) 11

Brewer v. General Motors, 926 S.W. 2d 774 (Tx.Ct. App. 1996) 8

Chicago Northwestern Transportation Co. v. Kalo Brick and Tile Co., 450 U.S. 311, 101 S.Ct. 1124 (1981) 9

Cippolone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608 (1992) 11

Connick v. Suzuki Motor Company, 174 Ill. 2d 482 (1996) 4

Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 114 S.Ct. 843 (1994) 9

Freightliner v. Myrick, 514 U.S. 280, 115 S.Ct. 1483 (1995) 6, 7, 8, 15

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S.Ct. 2239 (1994) 9

Henry Ford Motor Company Bronco II Products Liability Litigation, 909 F.Supp. 400 (E.D. La. 1995) 8

Hillsborough County, Florida v. Automated Medical Labs., Inc., 471 U.S. 707, 105 S.Ct. 2371 (1985) 15

Medtronic Inc. v. Lohr, 518 U.S. 470, 116 S.Ct. 2240 (1996) 5, 12, 13

Nat'l Kerosene Heater Association v. Massachusetts, 653 F.Supp. 1079 (D. Mass. 1986) 16

New York Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 115 S.Ct. 1671 (1995) 9, 14

Orman v. Charles Schwab and Co., 179 Ill. 2d 282 (1997) 16

Perona v. Volkswagen of America, Inc., 292 Ill. App. 3d 59 (1997) 4

Richards v. Michelin Tire Corp., 786 F. Supp. 959 (S.D. Al. 1992) 16

Shaw v. Delta Air Lines, 463 U.S. 85, 103 S.Ct. 2890 (1983) 11

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615 (1984) 9

Tebbetts v. Ford Motor Company, 140 N.H. 203, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, 116 S.Ct. 773 (1995) 8

Verb v. Motorola, Inc., 284 Ill. App. 3d 460 (1st Dist. 1996) 14

Wilson v. Bradlees of New England, Inc., 96 F.3d 552, *cert. denied*, 117 S.Ct. 1083 (1996) 8

Wilson v. Pleasant Cong., 660 N.E. 2d 327 (Ind. 1995) 8

Statutes

15 U.S.C. §1203 8

21 U.S.C. §360k(a) 12

21 U.S.C. §360kk 1, 2, 4, 16

21 U.S.C. §360pp(f) 2, 16

21 U.S.C. §360ss 2, 4, 9, 10

28 U.S.C. §1257(a) 2

42 U.S.C. §5403(d) 8

49 U.S.C. §30101 . . . . . 13, 14

49 U.S.C. §30103 8

PETITION FOR WRIT OF CERTIORARI

Petitioner, Frank J. Schiffner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court for the First District, Sixth Division entered in this cause on June 30, 1998.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, Sixth Division is reported at 297 Ill. App. 3d 1099 (1st Dist. 1998). It is reprinted at page 1 of the Appendix ("App.").

The order of the Illinois Supreme Court denying the Petition for Leave to Appeal has not been reported. It is reprinted at App. at 18.

JURISDICTION

Petitioner filed his Fourth Amended Class Action Complaint ("Complaint") in Illinois state court raising various state law causes of action. On June 16, 1997, the Circuit Court of Cook County dismissed the case because, in that Court's opinion, the causes of action were preempted by the Electronic Products Radiation Control Act, 21 U.S.C. §360kk *et seq.* ("EPRCA") and the pleading failed to allege compensable damages.

On Petitioner's appeal, the Appellate Court, on June 30, 1998, found that the Complaint did state a claim for compensable damages under Illinois law. The Appellate Court, however, held that the causes of action were preempted by the EPRCA.

Petitioner filed a petition for leave to appeal to the Illinois Supreme Court. On October 6, 1998, the Illinois Supreme Court denied Petitioner's petition.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

21 U.S.C. §360ss

Whenever any standard prescribed pursuant to §360kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. § 360pp(f)

The remedies provided by this part shall be in addition to and not in substitution for any other remedies provided by law.

STATEMENT OF THE CASE

On June 16, 1997, the Circuit Court of Cook County dismissed Petitioner's Complaint finding that Petitioner's causes of action were preempted by the Electronic Product Radiation Control Act ("EPRCA"), 21 U.S.C. §360kk *et seq.* The trial court further found that Petitioner failed to state a cause of action because he did not allege suffering any compensable injury.

Petitioner timely filed a notice of appeal from the ruling of the trial court. The Appellate Court, after briefing and argument, issued an opinion on June 30, 1998. App. at 1. The Appellate Court held that Petitioner did, in fact, allege compensable injuries in his Complaint. However, the Appellate Court affirmed the trial court's finding that the claims, though validly stated, were preempted by the EPRCA. On July 16, 1998, Petitioner timely filed a petition for leave to appeal. On October 6, 1998, the Illinois Supreme Court denied Petitioner's petition for leave to appeal. App. at 18.

Petitioner purchased a new cellular portable telephone manufactured by Defendant. Petitioner became concerned with various aspects of his purchase and, on July 30, 1994, wrote to Defendant complaining of the transaction and asking that Defendant respond to his concerns. On March 24, 1997, Petitioner filed his Complaint in this case. The Complaint alleges causes of action sounding in consumer fraud, breach of the implied warranty of merchantability and violation of the Magnuson-Moss Warranty Act.

The bases for these causes of action were that Defendant manufactured and sold portable cellular telephones which were less than the bargained-for value in that they were without adequate information about the health risks, lacked information on the effects of electromagnetic frequencies (EMF) on human cells, without guards to shield the user from EMF radiation, without adequate instructions on how to use the phone (including how to hold the phone so as to reduce exposure from EMF radiation) and without adequate design so as to increase the distance between the user's head and the antenna of the phone.

The trial court dismissed Petitioner's Complaint, finding that it failed to allege compensable injuries. Additionally, the trial court held that Petitioner's claims were preempted by the EPRCA. App. at 2.

The Appellate Court disagreed with the trial court on the issue of compensable damages. The Appellate Court concluded that, in light of Illinois court opinions in *Connick v. Suzuki Motor Company*, 174 Ill. 2d 482 (1996) and *Perona v. Volkswagen of America, Inc.*, 292 Ill. App. 3d 59 (1997), Petitioner had properly pled damages for causes of action sounding in consumer fraud, breach of warranty, and Magnuson-Moss. App. at 14. However, the Appellate Court found that Petitioner's causes of action were preempted by federal law, specifically the EPRCA. App. at 14.

The Appellate Court discussed the standards applicable when reviewing a federal preemption question and noted that federal court decisions controlled over state decisions. App. at 8. However, that Court noted that there were no federal decisions construing the EPRCA. App. at 8.

The preemption language of the EPRCA states in pertinent part:

> Whenever any standard prescribed pursuant to §360 kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. §360ss.

The Appellate Court noted that the EPRCA did not expressly preempt Petitioner's claims. App. at 9. Rather, the Court found that preemption was appropriate when there was regulation in such detail to leave no room for state involvement. App. at 9.

Acknowledging that there were no standards for performance set for the applicable product under the EPRCA, the Appellate Court relied upon the proposition that Congress could have intended the agency to regulate and set pervasive national standards, App. at 10, and that the exclusive power to do so was provided in the general empowerment clause of the EPRCA.

The Appellate Court distinguished this Court's recent decision in *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240 (1996), stating that the preemption analysis is different since the plaintiff's state law claims in *Lohr* involved personal injuries. App. at 11.

Finally, the Appellate Court rejected Petitioner's reliance on the savings clause language in the EPRCA relying instead, without justification, on the general statement that a general savings clause is not conclusive and does not rule out implied preemption. App. at 13-14.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS REVIEWED IDENTICAL PREEMPTION LANGUAGE IN OTHER FEDERAL STATUTES AND HELD THAT STATE CLAIMS WERE NOT PREEMPTED.

Petitioner asks this Court to review the judgment of the Appellate Court because it conflicts with rulings of this Court interpreting the preemptive reach of statutory provisions in federal statutes. This Court, and numerous other federal courts, have interpreted both verbatim and similar statutory preemption language from other federal statutes as not preempting state law causes of action. Allowing the Appellate Court's conflicting ruling to stand will create a morass of inconsistent rulings interpreting the same statutory language.

This Court refused to preempt state law causes of action when it construed an identical preemption clause. *See Freightliner v. Myrick*, 514 U.S. 280, 283, 115 S.Ct. 1483, 1485 (1995). In *Myrick,* the National Traffic and Motor Vehicle Safety Act ("Safety Act") provided:

> Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

Id. at 284, 115 S.Ct. at 1486. This language is essentially verbatim to the language of the EPRCA. In

Myrick, the Supreme Court concluded that there was no preemption and that the Safety Act's preemption clause applied only:

> Whenever a federal motor vehicle safety standard . . . is in effect with respect to the same aspect of performance regulated by a state standard. . . .

Id. at 286, 115 S.Ct. at 1487. The Court concluded that because there was no current standard set under the Safety Act:

> There is simply no minimum, objective standard stated at all. Therefore, states remain free to establish or continue in effect their own safety standards concerning those aspects of performance. (emphasis added)

Id.

Thus, this Court has construed identical language to the preemption language at issue in this case and found that where there is no standard in effect, there is no preemption of a state law cause of action, and states remain free to pass any standard in relation to performance that they desire. It would be improper to construe Congressional intent under one statute to be different than Congressional intent under another statute when Congress chose to use the exact preemptive language in both statutes. Moreover, if Congress had intended something other than that which this Court held in *Myrick*, it could have amended both the EPRCA, and the Safety Act, to clarify its intention.

The current Federal Motor Vehicle Safety Act ("FMVSA") preemption provisions are now contained at

49 U.S.C. §30103. These provisions are similar in language, and identical in meaning, to the language construed by the Supreme Court in *Myrick*. Numerous federal and state courts have found that this language does not preempt state law causes of action. *See Henry Ford Motor Company Bronco II Products Liability Litigation*, 909 F.Supp. 400 (E.D. La. 1995); *Brewer v. General Motors*, 926 S.W. 2d 774 (Tx.Ct. App. 1996); *Tebbetts v. Ford Motor Company*, 140 N.H. 203, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, 116 S.Ct. 773 (1995); *Wilson v. Pleasant Cong.*, 660 N.E.2d 327 (Ind. 1995).

While the Appellate Court ruling is inconsistent with this Court's ruling in *Myrick*, it also implicates the construction of other federal statutes. Both the Flammable Fabrics Act, 15 U.S.C. §1203, and the Manufactured Home Construction and Safety Standards Act, 42 U.S.C. §5403(d), contain identical preemption clauses. Cases interpreting those statutes have upheld state law claims. *See Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552, *cert. den.*, 117 S.Ct. 1083 (1996). Allowing a ruling upholding the preemption of these causes of action will lead to the obliteration of the rules this Court has brought to preemption analysis. The Illinois ruling is a ruling against the preemption rulings of this Court with decisive and national impact. This Court should grant certiorari to review this matter. Alternatively, this Court should exercise its supervisory authority and reverse the rulings of the Illinois Courts.

II.

ANALYSIS OF THE PREEMPTION LANGUAGE OF THE EPRCA REVEALS NO CONGRESSIONAL INTENT TO PREEMPT STATE LAWS WHICH DO NOT CONFLICT WITH A FEDERAL STANDARD.

In determining whether a federal statute preempts state law causes of action, a court must attempt to discern Congressional intent, and preemption is appropriate only if it is the clear and manifest purpose of Congress. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252, 114 S.Ct. 2239 (1994); *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345, 114 S.Ct. 843 (1994). There is a strong presumption against preemption, particularly where a party is deprived of all judicial remedies. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 104 S.Ct. 615 (1984). Preemption of state law by federal statute or regulation is not favored and is limited to situations where state law claims interfere with or are contrary to federal law. *Chicago Northwestern Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130 (1981). The intention of Congress to preempt state law may be manifested by express provision, implication, or by a conflict between federal and state law. *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 1676 (1995).

It is indisputable that the EPRCA does not expressly preempt Petitioner's claims here. App. at 9. *See* §360ss. Further, as demonstrated herein, Petitioner's causes of action are not impliedly preempted, nor did Congress intend to so exhaustively regulate the field that there is no room left for state regulation. Finally, enforcement of the state law claims will not conflict with the nonexistent regulatory scheme of the FDA.

A. FEDERAL REGULATION OF PRODUCTS EMITTING RADIATION IS NOT EXCLUSIVE.

The preemption language of the EPRCA provides:

> Whenever any standard prescribed pursuant to §360kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. §360ss.

A plain and common sense reading of this statute yields but one conclusion. A state may have a standard in effect when there is no federal standard covering an aspect of performance of an electronic product. Otherwise, the language in the statute "or to continue in effect" would be meaningless and contrary to fundamental principles of statutory construction. If Congress had intended to exhaustively regulate the field, prohibiting any state regulation, then not only would the preemption statute simply prohibit any state regulation whatsoever, but it would also preclude a state from ever passing any regulations.

The preemption clause clearly and expressly allows a state to promulgate standards for electronic products, even when a federal standard is in effect under the statute, so long as the state standard is identical to the federal standard. Thus, it is the clear intention of Congress, expressed in the statute, to allow for state regulation. In fact, counsel for Motorola expressly conceded to the Appellate Court, at oral argument, that a state could pass a standard as long as the state standard was

identical to a federal standard in effect. As this Court has repeatedly stated:

> We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.

Cippolone v. Liggett Group, Inc. 505 U.S. 504, 521, 112 S.Ct. 2608, 2620 (1992), *quoting, Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900 (1983). Even in light of the broad preemptive reach of the Cigarette Labeling Act, the Court found that some state law actions were not preempted. *Id.* at 523-31.

In order to even trigger any of these preemptive provisions, a federal regulation promulgated under the statute must exist. It is undisputed that no federal regulations have ever been passed covering any of the products at issue here during the relevant periods for Petitioner's Complaint.

B. FEDERAL STATUTES WITH SIMILAR LANGUAGE AND MEANING HAVE BEEN CONSTRUED AGAINST PREEMPTION OF STATE LAW CLAIMS.

The United States Supreme Court and numerous federal courts have construed federal statutory provisions with identical or effectively identical language as concerned here, and found that state law causes of action were not preempted. The Illinois Court's ruling threatens those decisions.

For example, an Environmental Protection Agency statute with similar language was held not to preempt state law claims. *Baltimore and Ohio Railroad v. Oberly*, 837 F.2d. 108 (3rd Cir. 1988). There, the statute provided:

> [N]o state . . . may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility . . . unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

Id. at 113-14.

Additionally, the statutory provisions in the same Food Drug and Cosmetic Act which precede the EPRCA are the Medical Device Amendments ("MDA"), which this Court recently held did not preempt state statutory and common law causes of action. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240 (1996). The preemptive language of the MDA provides:

> No state . . . may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from or in addition to any requirement applicable under this chapter to that device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. §360k(a). There, as the Appellate Court found here, defendants argued implied preemption of any state law claim due to the general empowerment clause of the statute. This Court disagreed. Without an express preemption provision, general preemption does not arise as a result of mere enactment of a statute. "Rather, in most cases, a state law will be preempted only to the extent that the FDA has promulgated a relevant federal 'requirement'." *Id.* at 496, 116 S.Ct. at 2255. This Court concluded that the jurisdiction of the

FDA was not intended to preempt laws of general application, including petitioner's failure to warn claims, manufacturing defect claims, labeling claims or negligent design claims. *Id.* at 500, 116 S.Ct. at 2257-58. *See also*, 49 U.S.C. §30101 (empowerment clause of the Federal Motor Vehicle Safety Act).

While *Lohr* involved personal injuries, the determination of preemption is not framed by the kind of damages claimed by the petitioner, but by the scope and reach of the statute. The petitioner in *Lohr* was entitled to sue for breach of warranty and to receive damages under a traditional contract analysis. If a breach of contract claim is preserved in those cases, there is no basis to find the properly pled claims preempted here solely because no personal injuries are alleged.

C. THERE IS NO IMPLIED PREEMPTION OF THESE CAUSES OF ACTION.

1. The Appellate Court Erred by Implying Preemption From the General Purpose of the Act.

In rejecting the savings clause which explicitly preserves state and common law remedies, the Appellate Court erroneously relied on the general purpose of the EPRCA to imply preemption of Petitioner's claims. App. at 10, 12-13. While the Appellate Court's analysis clearly ignores the express intent of Congress, it fails for additional reasons. By reading the general purpose and empowerment clause of the EPRCA to the exclusion of the preemption and savings clauses, the Appellate Court ignored the instructions set forth by this Court:

> [S]uch an expansive reading of the preemption clause would "read Congress's words of limita-

> tion as a mere sham, and . . . read the presumption against preemption out of the law whenever Congress speaks to the matter with generality."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 1677 (1995).

The Appellate Court's reliance on the decision in *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 469 (1st Dist. 1996), App. at 10, for the proposition that the FDA's power to regulate the subject matter covered in the instant case is exclusive, ignores the plain language of the statute. Nowhere in the empowerment clause, §360kk, or anywhere else in the concerned statute, does Congress state that the FDA has the exclusive power to regulate these areas. In fact, were this the case there would be no need for a preemption clause that preempted only state regulation which was different than a "standard proscribed pursuant to . . . this title. . . ."

Again, reference to the FMVSA is instructive. As noted above, the identical preemptive language did not lead to preemption of state actions where there was no federal standard in effect. In the FMVSA, the Purpose and Policy clause provides that:

> it is necessary—
>
> > (1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and
> >
> > (2) to carry out needed safety research and development.

49 U.S.C. §30101.

This empowerment is no different than the empowerment under the EPRCA. Since the Supreme Court and the other federal and state courts have found no basis for implied preemption under the FMVSA, it is improper to import a different, more expansive, intent to Congress in promulgating the EPRCA. *See Myrick,* 514 U.S. at 288-89, 115 S.Ct. at 1488.

2. The Lack of Federal Regulation Does Not Imply An Affirmative Decision That No Regulation is Necessary or Required.

While the Appellate Court did not expressly hold that the FDA's non-regulation or non-issuance of standards constituted an affirmative decision that no standards were necessary, App. at 10, it did discuss the issue and Defendant below raised that argument in support of preemption. This Court has repeatedly held that non-regulation will not rise to the level of an affirmative decision that no regulation is necessary or allowed, in part:

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for the regulations to be exclusive.

Hillsborough County, Florida v. Automated Medical Labs., Inc., 471 U.S. 707, 718, 105 S.Ct. 2371 (1985).

This identical argument was rejected in *Myrick*. 514 U.S. at 286-87, 115 S.Ct. at 1487. In fact, in *Myrick*, there was a federal regulation in effect, but it had been vacated by a federal court decision. *See also, Nat'l*

Kerosene Heater Association v. Massachusetts, 653 F.Supp. 1079 (D. Mass. 1986) (Consumer Product Safety Act preemption is limited to safety standards which are actually set.), *and Richards v. Michelin Tire Corp.*, 786 F. Supp. 959 (S.D. Al. 1992) (NHTSA decision not to impose regulatory standards on mismatched tires does not equal a decision to preempt state regulation.) Similarly, that argument, if raised in opposition to this Petition, must be rejected here.

III.

THE SAVINGS CLAUSE PRESERVES PETITIONER'S CLAIMS.

The EPRCA, as with many federal statutes, contains a savings clause. The clause provides that "[t]he remedies provided for in this part shall be in addition to and not in substitution for any other remedies provided for by law." 21 U.S.C. § 360pp (f). The Appellate Court found that the savings clause was no help to Petitioner because the general empowerment provisions, 21 U.S.C. § 360kk, authorized the FDA to regulate health and safety matters. App. at 13. The Appellate Court relied upon the Illinois Supreme Court decision in *Orman v. Charles Schwab and Co.*, 179 Ill. 2d 282, 293 (1997). *Orman* is factually inapposite.[1]

Giving the savings clause its reasonable and natural meaning, Petitioner's claims are preserved as they do not conflict with any federal standard.

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[1] In fact, *Orman* stands only for the proposition that a savings clause does not protect a state law that actually conflicts with the federal regulatory scheme. Since there are no federal standards in effect, this argument is circular at best.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant his Petition for Certiorari to the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

FRANK J. SCHIFFNER, on Behalf of Himself and All Other Persons Similarly Situated, Plaintiff-Appellant, v. MOTOROLA, INC., Defendant-Appellee.

No. 1-97-2456

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SIXTH DIVISION

297 Ill. App. 3d 1099; 697 N.E.2d 868; 1998 Ill. App. LEXIS 447; 232 Ill. Dec. 126; CCH Prod. Liab. Rep. P15,319

June 30, 1998, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication August 14, 1998.

PRIOR HISTORY: Appeal from the *Circuit Court of Cook County. No. 95 CH 01879.* Honorable Stephen A. Schiller, Judge Presiding.

DISPOSITION: Affirmed.

CORE TERMS: state law, preemption, phone, telephone, cellular, consumer fraud, preempted, preempt, radiation, portable, causes of action, electronic, compensable injury, savings clause, federal law, diminished, breach of warranty, federal preemption, preemption issue, regulation, warning, motion to dismiss, emit, express provision, reinstated, proven, label, breach of implied warranty, failed to provide, merchantability

COUNSEL: For Frank J. Schiffner, APPELLANT: Ben Barnow, Alan M. Goldberg, and Juanita H. Chen, all of Barnow & Goldberg, P.C., and Aron D. Robinson, both of Chicago.

For Motorola, Inc., APPELLEE: Garrett B. Johnson, Brian D. Sieve, and Terrence J. Dee, all of Kirkland & Ellis, of Chicago.

JUDGES: JUSTICE GREIMAN delivered the opinion of the court. ZWICK and QUINN, JJ., concur.

OPINION BY: GREIMAN

OPINION:

[*1100] JUSTICE GREIMAN delivered the opinion of the court:

Plaintiff Frank J. Schiffner appeals the dismissal of his fourth amended complaint against defendant Motorola, Inc., based on defendant's marketing and sale of cellular telephones. The circuit court granted defendant's section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 1996)), finding that federal law preempted plaintiff's state law causes of action pursuant to the decision in *Verb v. Motorola, Inc., 284 Ill. App. 3d 460 (1996),* appeal denied, *172 Ill. 2d 568 (1997).*

The issue on appeal is whether plaintiff's causes of action under state law are preempted by federal law, i.e., the Electronic Product Radiation Control Act (Act) (*21 U.S.C.A. §§ 360hh* through 360ss (West [*1101] Supp. 1998)). The Verb court held that the Act preempted the same causes of action advanced by the instant plaintiff [**2] in his fourth amended complaint. We find the Verb case persuasive and dispositive of this issue. Thus, we affirm the dismissal of plaintiff's complaint.

In addition, however, plaintiff contends that his complaint, unlike the Verb complaint, sufficiently stated a compensable injury by alleging the diminished value of

a product due to defects associated with the product. We agree with plaintiff that such an allegation states a compensable injury.

The procedural background of this case tracks the path of the Verb complaint through the appellate decision in Verb, which was first filed in March 1996 and then, upon the denial of a petition for rehearing, was issued as a modified opinion in November 1996.

In August 1993, the circuit court dismissed the Verb complaint, holding that its subject matter was preempted by federal law and ruling that the Verb plaintiffs had not alleged a compensable injury. The circuit court's ruling was appealed.

In June 1995, the present plaintiff filed a second amended complaint. Defendant filed a motion to dismiss based on the circuit court's previous dismissal of the Verb complaint, which was then pending on appeal.

In March [**3] 1996, the appellate court filed its opinion in Verb and affirmed the dismissal of the Verb complaint. The Verb plaintiffs filed a petition for rehearing with the appellate court.

In response to the March 1996 Verb decision, the present plaintiff sought and received leave to file another amended complaint in June 1996. In September 1996, defendant filed another section 2-615 motion to dismiss plaintiff's third amended complaint or, in the alternative, a stay pending the appellate court's ruling the rehearing petition on Verb. The circuit court granted a stay. In November 1996, the appellate court denied the Verb rehearing petition and filed a modified opinion.

In response to the Verb modified opinion, the circuit court lifted the stay in the present case in February 1997. On February 5, 1997, the circuit court, finding that the Verb opinion was dispositive on the preemption issue and binding on it, dismissed plaintiff's third amended complaint and allowed plaintiff to amend again.

With this background and direct link to Verb, plaintiff then filed his fourth amended complaint, which is at issue in the present appeal. Plaintiff's fourth amended [**4] complaint arises out of the marketing and sale of cellular portable telephones by defendant. Plaintiff alleged three causes of action: (1) breach of implied warranty of merchantability under the Uniform Commercial Code (810 ILCS 5/2-103 et [*1102] seq. (West 1992)); (2) consumer fraud; and (3) violation of the Magnuson-Moss Warranty Act (*15 U.S.C. § 2301* et seq. (1994)). In addition, plaintiff sought certain injunctive relief to stop defendant from continuing its alleged illegal acts and conduct on an ongoing basis as alleged in the complaint.

The gravamen of plaintiff's complaint is that defendant manufactured and sold cellular portable telephones that were defective because of the uncertain safety of the product and defendant's failure to disclose potential health risks and potential hazards associated with the use of the product. Cellular portable phones operate with a transmission antenna that emits the phone's electromagnetic radio waves into the phone unit. Plaintiff further alleges that defendant did not complete studies to definitively and accurately ascertain the safety of the use of the phones and defendant failed to advise plaintiff that the phones had not been proven

[**5] safe. Plaintiff also alleged that defendant failed to adequately package or label the phones; failed to provide adequate information about the health risks; failed to provide adequate guards to shield the user from electromagnetic field (EMF) radiation; failed to provide adequate instructions on how to use the phone; and failed to adequately design the phone.

Defendant again filed a section 2-615 motion to dismiss plaintiff's complaint. The circuit court dismissed plaintiff's fourth amended complaint and, relying on the Verb decision, stated that the grounds for dismissal were preemption and "a lack of cognizable injury."

As a threshold matter, defendant asserts that the principles of stare decisis require this panel, the sixth division of the first district, to follow the precedent established by the second division of the first district in Verb. Defendant's assertion fails for two reasons. First, the doctrine of stare decisis requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts. *Village of Northbrook v. Cannon, 61 Ill. App. 3d 315, 322, 18 Ill. Dec. 572, 377 N.E.2d 1208 (1978).* Second, [**6] "stare decisis is a policy of the courts to stand by precedent and leave settled points of law undisturbed." *Charles v. Seigfried, 165 Ill. 2d 482, 492, 209 Ill. Dec. 226, 651 N.E.2d 154 (1995).* The point of law at issue in the instant case is hardly settled law because, to date, the Verb opinion is the sole decision in the country on federal preemption under the Act. Moreover, a split in authority between the divisions of the first district is not unprecedented and has led to an ultimate resolution by the supreme court. See, e.g., *Moore v. Jackson Park Hospital, 95 Ill. 2d 223, 69 Ill. Dec. 191, 447 N.E.*

2d 408 (1983) (resolving contrary decisions between the fourth division of the first district *(Muller v. Health & Hospital Governing Comm'n, 106 Ill. App. 3d 383, 62 Ill. Dec. 444, 436 N.E.2d 26 (1982))* and the first division of the first district *(Isaacs v. Michael Reese Hospital & Medical Center, 101 Ill. App. 3d 876, 57 Ill. Dec. 261, 428 N.E.2d 941 [*1103] (1981)))*.[1] Thus, we decline defendant's invitation to apply stare decisis to the instant appeal.

[**7] We review de novo the dismissal of a complaint under section 2-615 for failure to state a cause of action upon which relief can be granted. *Vernon v. Schuster, 179 Ill. 2d 338, 344, 228 Ill. Dec. 195, 688 N.E.2d 1172 (1997); Douglas Theater Corp. v. Chicago Title & Trust Co., 288 Ill. App. 3d 880, 883, 224 Ill. Dec. 249, 681 N.E.2d 564 (1997).*

On appeal, plaintiff essentially asserts that the Verb case was wrongly decided and that the Verb opinion failed to address plaintiff's arguments. We disagree.

The principles of federal preemption are well established. The doctrine of preemption is based on the supremacy clause of the United States Constitution, which mandates that "'the Laws of the United States

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[1] While appellate court panels are bound only by higher courts, a circuit court may find it confusing to determine by which appellate court it may be bound. See *Aleckson v. Village of Round Lake Park, 176 Ill. 2d 82, 94, 223 Ill. Dec. 451, 679 N.E.2d 1224 (1997)* (Harrison, J., specially concurring, joined by Heiple, C.J.) (the majority holds that a circuit court is bound by the decisions of the appellate court of the district in which its sits and the special concurrence observes that since there is only one appellate court, a decision by any appellate court is binding on all circuit courts in the state).

*** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Orman v. Charles Schwab & Co., 179 Ill. 2d 282, 285, 227 Ill. Dec. 927, 688 N.E.2d 620 (1997)* (applied federal preemption), quoting U.S. Const., art. VI, cl. 2; *Stern v. Norwest Mortgage, Inc., 179 Ill. 2d 160, 166, 227 Ill. Dec. 762, 688 N.E.2d 99 (1997)* (rejected federal [**8] preemption).

Congressional intent determines whether a federal statute preempts state law. *Scholtens v. Schneider, 173 Ill. 2d 375, 379, 219 Ill. Dec. 490, 671 N.E.2d 657 (1996)* (no preemption); *Busch v. Graphic Color Corp., 169 Ill. 2d 325, 334, 214 Ill. Dec. 831, 662 N.E.2d 397 (1996)* (and cases cited therein) (preemption applies). "An act of Congress or regulatory law promulgated thereunder may supersede the statutory, regulatory or common law of any state where such '[is] the clear and manifest purpose of Congress.'" *Orman, 179 Ill. 2d at 285,* quoting *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 422, 112 S. Ct. 2608, 2617 (1992),* quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152 (1947).*

The intent of Congress to preempt state law may be manifested "'by express provision, by implication, or by a conflict between federal and state law.'" *Busch, 169 Ill. 2d at 335,* quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance, [*1104] Co., 514 U.S. 645, 654, 131 L. Ed. 2d 695, 704, 115 S. Ct. 1671, 1676 (1995);* see also *Orman, 179 Ill. 2d at 285* [**9] ("[a] congressional act can either expressly or implicitly preempt a state cause of action"),

citing *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995);* see also *Scholtens, 173 Ill. 2d at 379* ("Congress' intent to preempt state law may be explicitly stated in the statute's language or implicitly contained in its structure and purpose"), citing *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 77 L. Ed. 2d 490, 500, 103 S. Ct. 2890, 2900 (1983).*

Notably, decisions of federal courts interpreting a federal act are controlling upon Illinois courts so that a federal act would be given uniform application. *Busch, 169 Ill. 2d at 335.* However, since no federal court has yet construed the preemptive scope of the Act, we can seek no guidance there. In addition, research has revealed that no other state has addressed the issue presented here. Thus, the only court to decide the preemptive effect of the Act is the Verb court.

The Verb court specifically found "that the FDA [Food and Drug Administration] does preempt a state's power over the issues in the case at bar because the FDA directly regulates electronic products [**10] that emit radiation with regard to public health." *Verb, 284 Ill. App. 3d at 468.* The Verb court quoted the Act as the empowering statute.

Factually, the Verb case and the instant case are indistinguishable: (1) the allegations in the complaints are virtually alike for purposes of the preemption issue, albeit not identical for purposes of the damage issue; and (2) the causes of action asserted in the complaints are the same. Regarding the allegations, the Verb court characterized the Verb complaint as follows:

> "In the present case, plaintiffs' complaint *** centered on the lack of warnings as to the safety of and

> possible health risks caused by cellular telephones purchased by them which, the parties agree, emit radiation. More specifically, as stated in plaintiffs' opening brief on appeal, 'This case arises out [of] the Defendants' failure to warn the consuming public, including putative Plaintiffs, of the risks associated with the use of cellular portable telephones and the Defendants' false pronouncements of the phones' "proven" safety, the safety of which has clearly not been proven.' (Emphasis in original.)" *Verb, 284 Ill. App. 3d at 469.*

The [**11] instant complaint can aptly be described in the exact same way. In addition, the causes of action are the same and plaintiff apparently does not contest that fact. The causes of action in each case include breach of implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act and consumer fraud.

As to the legal issue, plaintiff's arguments on appeal as to the [*1105] merits of preemption were addressed by the Verb court. First, plaintiff observes that the Act does not expressly preempt state law claims. Indeed, the Verb court did not find that an express preemption existed in the Act. Rather, the Verb court correctly observed that "Congress can assert exclusive power either by explicit statutory language or by regulating a matter in such detail as to leave no room for state involvement." *Verb, 284 Ill. App. 3d at 467;* see also *Busch, 169 Ill. 2d at 335* (federal preemption can be evidenced "by express provision, by implication, or by a conflict between federal and state law" (emphasis added)).

Second, plaintiff argues that preemption does not apply because there have been no standards prescribed

for the performance of cellular portable telephones [**12] and, therefore, there can be no conflict between federal and state law. The Verb court expressly found:

> "It is irrelevant whether the FDA has not set any standards, as plaintiffs allege, because the power to do so nonetheless resides with the FDA. Any determination by the trial court as to whether the cellular telephones are unsafe and what warnings and labels must be made would require the court to establish standards of safety and warnings, which would usurp the FDA's exclusive power to do so with respect to electronic products that emit radiation." *Verb, 284 Ill. App. 3d at 469.*

The absence of an affirmative regulation by an agency that is authorized to make such regulations does not discharge its power to do so and does not extinguish Congress' intent to relegate the authority to a federal agency to enact, where appropriate and approved, uniform national standards. See *Ray v. Atlantic Richfield Co., 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004 (1978);* cf. *Freightliner Corp. v. Myrick, 514 U.S. 280, 286, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995)* (the applicable federal agency did not have "all authority over the regulated area" under [**13] a different statute). Moreover, as previously stated, the United States Supreme Court has recognized three ways in which preemption of state law may arise: "by express provision, by implication, or by a conflict between federal and state law." (Emphasis added.) *New York State Conference of Blue Cross & Blue Shield Plans, 514 U.S. at 654, 131 L. Ed. 2d at 704, 115 S. Ct. at 1676.* Therefore, the lack of an actual conflict between federal and state law does not necessarily determine whether preemption applies.

Third, plaintiff argues that the Act does not preempt his state law claims, relying on *Medtronic, Inc. v. Lohr, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996).* The Verb court discussed and distinguished the Lohr case. *Verb, 284 Ill. App. 3d at 470.* The Lohr [*1106] court held that the plaintiffs' state claims, which were based on the defendant's manufacture of a pacemaker that failed and caused injuries to the recipient of the pacemaker, were not preempted by the federal Medical Device Amendments of 1976 (MDA) (*21 U.S.C. § 360* (1994)). The Verb court held that "Lohr is distinguishable from the present case not only because it involved a statute [**14] different from the one here, but more important because plaintiffs here did not allege a present personal injury." *Verb, 284 Ill. App. 3d at 470.*

Fourth, plaintiff criticizes the Verb court for only discussing Lohr and not addressing "most of Plaintiff's authority dealing with construction of similar statutes." The Verb court correctly noted that "the key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject." (Emphasis added.) *Verb, 284 Ill. App. 3d at 467-68.* The Supreme Court in Lohr emphasized that to analyze preemption, courts must consider the language of the statute, the statutory framework surrounding it, the structure and purpose of the statute as a whole, and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Lohr, 518 U.S. at 486, 135 L. Ed. 2d at 716, 116 S. Ct. at 2250-51.* Obviously different statutes,

different preemption provisions and different [**15] regulations will be interpreted differently. E.g., *Orman, 179 Ill. 2d 282, 227 Ill. Dec. 927, 688 N.E.2d 620* (class actions alleging state law claims were preempted by the federal Securities Exchange Act of 1934 *(15 U.S.C. § 78a* et seq. (1994))); *Busch, 169 Ill. 2d 325, 214 Ill. Dec. 831, 662 N.E.2d 397* (common law claims were preempted by the Federal Hazardous Substances Act (*15 U.S.C. § 1261* et seq. (1988)), cf. *Scholtens, 173 Ill. 2d 375, 219 Ill. Dec. 490, 671 N.E.2d 657* (the federal Employee Retirement Income Security Act (*29 U.S.C. § 1144* (1982)) did not preempt state theory of recovery). Furthermore, even the same statute can require differing results as to preemption given different underlying facts. E.g., *Lohr, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240* (the MDA did not preempt state claims); cf., R.F. v. Abbott Laboratories, No. A-2050-96T2 (May 7, 1998) (the MDA did preempt the plaintiffs' state claims due to FDA involvement). As noted above, the Verb court discussed the Lohr decision, the case on which plaintiff primarily relies, and distinguished it on the grounds that it involved a different statute. This court is not aware of any requirement that [**16] its decisions must include or discuss each and every case cited as authority by a party on appeal.

Fifth, plaintiff contends that state claims are allowed by a general savings clause in the Act, which declares that "the remedies provided for in this part shall be in addition to and not in substitution [*1107] for any other remedies provided by law." *21 U.S.C.A. § 360pp*(f) (West Supp. 1998). Although it did not mention the savings clause, the Verb court relied on two other provisions in the Act. The Verb court quoted the provision mandating the FDA secretary to promulgate regulations

> "for electronic products to control the emission of electronic product radiation from such products if he determines that such standards are necessary for the protection of the public health and safety. Such standards may include provisions for the testing of such products and the measurement of their electronic product radiation emissions, may require the attachment of warning signs and labels, and may require the provision of instructions for the installation, operation, and use of such products." *21 U.S.C.A. § 360kk*(a)(1) (West Supp. 1998).

The Act further includes a preemption clause: [**17]

> "Whenever any standard prescribed pursuant to section 360kk of this title with respect to an aspect of performance of an electronic product is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the Federal Standard. Nothing in this part shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a requirement with respect to emission of radiation from electronic products procured for its own use if such requirement imposes a more restrictive standard than that required to comply with the otherwise applicable Federal standard." *21 U.S.C.A. § 360ss* (West Supp. 1998).

Based on these provisions, the Verb court held that the plaintiffs' claims were preempted by the FDA. *Verb, 284 Ill. App. 3d at 468-69.* Although the Verb court did not discuss the general savings clause, the Illinois Supreme Court in Orman found that a general savings clause is not conclusive as to preemption. *Orman, 179*

Ill. 2d at 292. [**18] The Illinois Supreme Court relied on the United States Supreme Court's opinion in Freightliner in explaining that "a statutory preemption clause which preempts state laws that conflict with the federal law, but which also preserves nonconflicting state laws, does not foreclose the possibility of implied preemption." *Orman, 179 Ill. 2d at 293,* citing *Freightliner, 514 U.S. at 288-89, 131 L. Ed. 2d at 393, 115 S. Ct. at 1488.* Accordingly, the general savings clause in the Act does not necessarily preserve state claims.

We find that the Verb decision was correctly decided and addressed the legal arguments now presented by plaintiff on the preemption issue. Accordingly, we affirm the dismissal of plaintiff's fourth amended complaint because the state claims are preempted by federal law.

[*1108] Notwithstanding our agreement with the Verb opinion on the preemption issue, we would not find the Verb opinion to be decisive on the damage issue because, unlike the Verb complaint, the instant complaint sufficiently alleged a compensable injury based on diminished value of the product due to defects associated with the product is a compensable injury in consumer fraud [**19] and breach of warranty causes of action. Claims for diminished value of an allegedly defective product without the pleading of any damage to the product or person were allowed in *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584 (1996),* and *Perona v. Volkswagen of America, Inc., 292 Ill. App. 3d 59, 225 Ill. Dec. 868, 684 N.E.2d 859 (1997).* Moreover, even the Verb court would have accepted such damage allegations. Most notably for the purposes of the present appeal the Verb

court held that the Verb plaintiffs failed to "allege that the telephones are defective" and "failed to plead specific facts *** that the telephones have diminished in value." *Verb, 284 Ill. App. 3d at 472.*

Paragraph 39 of the instant fourth amended complaint alleges:

> "Defendants[']] cellular portable phones were defective in that they were sold:
>
> a. Without adequate information about the health risks and the lack of information on the effects of EMF on human cells;
>
> b. Without adequate guards to shield the user from the EMF radiation;
>
> c. Without adequate instructions on how to use the phone including how to hold the phone so as to reduce exposure from EMF [**20] radiation;
>
> d. Without adequate design so as to increase the distance between the user's head and the antenna of the phone."

Regarding damages in its count for breach of implied warranty of merchantability, paragraph 43 of plaintiff's complaint states:

> "Plaintiff and members of the Class have been damaged by a reduction in the value of the cellular portable telephones, limiting the duration of their calls and usage of the cellular portable telephone, by modifying the cellular portable telephones or the use thereof to limit or mitigate their exposure to the harmful or potentially harmful radio waves, by being subjected to increased risk of exposure to potentially harmful radio waves, by failure to receive that which was bargained for."

Regarding damages in his count for statutory consumer fraud, paragraph 56 of the complaint states that "Plaintiff and Class Plaintiffs have been damaged as well by the loss of value of the phones they have purchased."

In Connick, the plaintiffs filed a class action lawsuit against car companies that manufactured the Suzuki Samurai after a consumer organization designated the Samurai as unsafe based on its excessive [*1109] risk of rolling over. In [**21] their complaint, plaintiffs alleged that the risk of rollover was due to a defect in either design or production, and stated claims for implied warranty and consumer fraud. "Significantly, plaintiffs did not allege that they had ever suffered a rollover accident in a Samurai. Rather, they sought compensation for the diminution in the vehicles' resale value due to the perceived safety risk." *Connick, 174 Ill. 2d at 489.*

The breach of warranty claim was dismissed by the supreme court in Connick, holding that the plaintiffs failed to allege sufficient notice to satisfy the notice requirement for a breach of warranty claim. *Connick, 174 Ill. 2d at 495.* The Connick court did not discuss the damage allegation for the breach of warranty claim.

The statutory consumer fraud count was reinstated but the Connick court did not discuss the damage allegation. *Connick, 174 Ill. 2d at 501-05.* The supreme court held that "we reinstate the Illinois consumer fraud count, but only insofar as it was based on the 1986 Car & Driver article or on Suzuki's concealment of material facts regarding the Samurai's safety risk." *Connick, 174 Ill. 2d at 505.* However, at least by

implication, [**22] if the damage allegation had been insufficient the supreme court would not have reinstated the claim.

In Perona, the plaintiffs filed a class action based on the alleged unintended acceleration of the Audi 5000 automobiles. Following the decision in Connick, the Perona court dismissed the breach of warranty count due to lack of notice and allowed the statutory consumer fraud count to stand. *Perona, 292 Ill. App. 3d at 64, 69.* Although the Perona court did not discuss the damage allegations in the complaint, it noted that the plaintiffs claimed that their cars lost their resale value and if the problem were not eventually remedied, their damages would be the amount of the diminution of the resale value. *Perona, 292 Ill. App. 3d at 62-63.* As in the Connick case, at least by implication, if the complaint had not sufficiently pled damages, then the Perona court would not have reinstated the consumer fraud claim.

We believe that the decisions in Connick, Perona, and Verb allow damage claims based on alleged diminished value of a product. Thus, unlike the Verb complaint, plaintiff's fourth amended complaint adequately alleged damages. [**23]

For all of the foregoing reasons, we affirm the dismissal of plaintiff's fourth amended complaint.

Affirmed.

ZWICK and QUINN, JJ., concur.

Frank J. Schiffner, etc., petitioner, v. Motorola, Inc., respondent.

No. 85976

SUPREME COURT OF ILLINOIS

1998 Ill. LEXIS 1479

October 6, 1998, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1] Leave to appeal, Appellate Court, First District. (1-97-2456).

JUDGES: McMorrow, J., took no part.

OPINION: Petition for leave to appeal denied.

McMorrow, J., took no part.

(2)

Supreme Court, U.S.
FILED
FEB 8 1999
CLERK

No. 98-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,
Petitioner,

v.

MOTOROLA, INC.,
Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois for the First District

BRIEF IN OPPOSITION

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2688

TABLE OF CONTENTS

PAGE

RULE 29.6 STATEMENT iii

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE RULING BELOW INVOLVES NO ISSUES OF GENERAL IMPORTANCE THAT MERIT REVIEW 7

II. THE RULING BELOW DOES NOT CONFLICT WITH ANY OTHER DECISIONS 9

III. IN ANY EVENT, INDEPENDENT STATE GROUNDS EXIST FOR AFFIRMING THE RULING BELOW 10

IV. THE COURT BELOW CORRECTLY HELD THAT SCHIFFNER'S CLAIMS ARE PREEMPTED 12

A. Federal Preemption Standards 12

B. Congress Gave The FDA Exclusive Authority Over Safety Regulations For Products That Emit Radiofrequency Energy, Such As Cellular Phones 13

C. Schiffner's Attacks On The Ruling Below Lack Merit 16

TABLE OF CONTENTS (Continued)

PAGE

1. *Myrick* Has No Relevance To This Case . . . 16

2. The Appellate Court Properly Considered Congress' Purpose In Passing The Act 17

3. The Savings Clause In The Act Does Not Preserve Schiffner's Claims 18

CONCLUSION 19

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Motorola, Incorporated hereby states that it has no parent corporation and two nonwholly owned subsidiaries that are publicly traded, Terosil, A.S. and Tesla Sezam, A.S.

TABLE OF AUTHORITIES

PAGE

Cases

Baltimore & Ohio R.R. v. Oberly,
837 F.2d 108 (3d Cir. 1988) 10

Board of Educ. v. A. C. & S., Inc.,
131 Ill. 2d 461,
546 N.E.2d 580 (1989) 10

Burbank v. Lockheed Air Terminal,
411 U.S. 624 (1973) 9

Connick v. Suzuki Motor Co., Ltd.,
174 Ill. 2d 482,
675 N.E.2d 584 (1996) 11

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 12

Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 5, 16, 17

Gorman v. Saf-T-Mate, Inc.,
513 F. Supp. 1028 (N.D. Ind. 1981) 11

Illinois Pure Water Comm., Inc. v. Yoder,
6 Ill. App. 3d 659,
286 N.E.2d 155 (5th Dist. 1972) 11

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 18

Jones v. Rath Packing Co.,
430 U.S. 519 (1977) 12

TABLE OF AUTHORITIES (Continued)

PAGE

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 5, 6, 8, 10, 12, 13, 18

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 18

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 12, 15, 17

Schiffner v. Motorola, Inc.,
297 Ill. App. 3d 1099,
697 N.E.2d 868 (1st Dist. 1998) 2, 8, 12

Shields v. Outboard Marine Corp.,
776 F. Supp. 1579 (M.D. Ga. 1991) 18

Verb v. Motorola, Inc.,
284 Ill. App. 3d 460,
622 N.E.2d 287 (1st Dist. 1997) .. 2, 3, 5-9, 11-13, 15

Verb v. Motorola, Inc.,
172 Ill. 2d 568,
679 N.E.2d 386 (1997) 3, 6

Statutory and Regulatory Materials

15 U.S.C. § 2301 11

15 U.S.C. § 2310(d) 11

15 U.S.C. § 2301, *et seq.* 4

TABLE OF AUTHORITIES (Continued)

PAGE

21 U.S.C. § 360ii(a)(1) 13, 15

21 U.S.C. § 360ii(a)(2) 13

21 U.S.C. § 360ii(a)(3) 13, 14

21 U.S.C. § 360ii(a)(4) 13

21 U.S.C. § 360ii(a)(5) 13

21 U.S.C. § 360ii(a)(6) 13, 14

21 U.S.C. § 360(k)(a) 9

21 U.S.C. § 360kk 14

21 U.S.C. § 360kk, *et seq.* 2

21 U.S.C. § 360pp(e) 18

21 U.S.C. § 360ss 10, 13, 18

42 U.S.C. §§ 4321-4370d 14

42 U.S.C. § 4901(a)(3) 10

42 U.S.C. §§ 4901-4918 9

47 C.F.R. §§ 1.1301-1.1307 14

49 U.S.C. §§ 30101-30169 9

815 ILCS § 505/1, *et seq.* 4

TABLE OF AUTHORITIES (Continued)

PAGE

Other Authorities

FDA Talk Paper No. 793,
Update on Cellular Phones (Feb. 4, 1993) 15

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61 Fed. Reg. 41006, 41007 (August 7, 1996) 14

R. Stern, *et. al.*, *Supreme Court Practice* § 4.12
(7th ed. 1993) 10

Sup. Ct. R. 10(b) 9

Sup. Ct. R. 10(c) 7, 9

No. 98-1094

IN THE

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OCTOBER TERM, 1998

FRANK J. SCHIFFNER,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois for the First District

BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Schiffner alleges that Respondent Motorola, Inc. did not adequately advise him and the public about supposed potential health risks associated with hand-held portable cellular telephones. But he does not allege injury to himself from cellular telephone use, nor does he contend that his phone malfunctioned. Rather, Schiffner claims that his phone was diminished in value by Motorola's inadequate warnings. His was the second of two nearly identical purported class actions

to be dismissed by the Illinois courts. The Illinois Supreme Court declined to review either case.

There is nothing about this case that warrants the Court's review. Schiffner's entire lawsuit was dismissed by the Circuit Court of Cook County, Illinois because, among other reasons, his claims are preempted by the Electronic Product Radiation Control Act (the "Act"), 21 U.S.C. § 360kk *et seq.* Late last year, the Illinois Appellate Court affirmed the Circuit Court's dismissal, holding that all of Schiffner's claims are preempted by the Act. *Schiffner v. Motorola, Inc.*, 297 Ill. App. 3d 1099, 697 N.E.2d 868 (1st Dist. 1998).

The Act was passed in 1968. In the three decades since, there have been only *two* reported decisions interpreting the express preemption provision in the Act — *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 622 N.E.2d 287 (1st Dist. 1997), and this case. Both decisions were issued by Illinois Appellate Courts in cases brought by the same plaintiffs' attorneys who represent Schiffner in this case. Both cases involved essentially identical warnings and labeling claims challenging the safety of cellular phones. In those two cases, two different panels of the Illinois Appellate Court independently concluded that plaintiffs' claims were preempted. In both cases, the plaintiffs sought review of the appellate decisions by the Illinois Supreme Court, and in both cases the Illinois Supreme Court declined to exercise its discretionary review. In *Verb*, plaintiffs chose not to file a petition for writ of certiorari with this Court.

This case is not worthy of review. It does not raise any important issue of federal law, as evidenced by the fact that there have only been two cases that have interpreted the Act during the last thirty years. Nor does the decision of the intermediate Illinois Appellate Court in this case conflict with any other decision that has interpreted the Act. To the contrary, the Appellate Court's decision in this case is fully consistent with, and reinforces, the *Verb* court's earlier holding. Finally, the Illinois Appellate Court's decision in this case was correct on the merits. The Illinois Appellate Court cited and followed

this Court's prior preemption precedent, and correctly applied the Court's teachings in its interpretation of the Act.

In short, Schiffner's petition for a writ of certiorari is baseless and should be denied. There is no reason for this Court to exercise its discretionary review in this case.

COUNTERSTATEMENT OF THE CASE

This case has its origins in another purported class action filed in the Circuit Court of Cook County, entitled *Verb v. Motorola, Inc.* In August 1993, the Circuit Court dismissed *Verb*. Unhappy with the Circuit Court's decision, Mr. Verb's lawyers did two things: (1) they followed the standard appellate course and appealed *Verb* to the Illinois Appellate Court, First District; and (2) they filed the same case over again on behalf of a different named class representative — Frank Schiffner. The First District subsequently affirmed the dismissal in *Verb*, holding, among other things, that allegations challenging the safety of cellular telephones are preempted by the Act. *See Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 672 N.E.2d 1287 (1996). The Illinois Supreme Court denied the *Verb* plaintiffs' petition for leave to appeal. 172 Ill. 2d 568, 679 N.E.2d 386 (1997).

Schiffner filed his Fourth Amended Complaint on March 24, 1997, alleging that Motorola manufactured, supplied, or sold portable cellular telephones without adequate warnings and product labels. (Cplt. ¶ 30) Each of Schiffner's four counts includes an allegation that Motorola did not adequately warn about supposed dangers associated with using cellular phones:

> Defendant failed to adequately advise plaintiff and the general public that (1) Defendant had not conducted tests to discern whether use of the cellular portable telephones posed any health risks to the users, and that (2) use of cellular portable telephones may be hazardous to the user's health.

(*Id.* ¶¶ 30, 44, 57) Similarly, each of Schiffner's claims includes an allegation that Motorola failed to label its products properly:

> Defendant also failed to adequately package and/or label the cellular portable telephones to apprise Plaintiff and the general public that (1) Defendant had not conducted tests to discern whether use of the cellular portable telephones posed any health risks to the users, and that (2) use of cellular portable telephones may be hazardous to the user's health.

(*Id.* ¶¶ 31, 44, 57) Schiffner also alleges that on February 4, 1993, Motorola misrepresented that cellular phones are safe when a company official "stated that cellular phones' safety is 'rooted in scientific fact' citing 'thousands of studies' taken over forty years." (*Id.* ¶ 20) This is the only affirmative misrepresentation alleged by Schiffner, and it occurred more than two years *after* he purchased his cellular phone.

Based on these allegations, Schiffner asserted four counts: breach of implied warranty of merchantability (Count I); violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS § 505/1, *et seq.* ("Consumer Fraud Act")(1993)(Count II); violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (1994)(Count III); and a claim for "injunctive relief" (Count IV). Schiffner pled no facts to show any actual, present compensable personal injury, and did not claim that the phone caused him any physical harm. Rather, Schiffner claims damages for a "reduction in the value of the cellular portable telephones" (Cplt. ¶ 43), and because he claims he "[has] not received the benefit of [his] bargain." (*Id.* ¶ 61)

On June 16, 1997, the Circuit Court dismissed Schiffner's Fourth Amended Complaint, ruling that Schiffner's claims were preempted by the Act, and failed to allege a compensable injury. App. 5. Schiffner appealed the dismissal. After briefing and oral argument, the Appellate Court affirmed, holding that the Act preempts Schiffner's claims. App. 1-17. The Appellate Court carefully analyzed the preemption issue in two parts.

First, the Appellate Court found that Schiffner's allegations and causes of action are "indistinguishable" from

Verb. *Id.* at 8. The Appellate Court concluded that, like *Verb*, Schiffner's claims "'centered on the lack of warnings as to the safety of and possible health risks caused by cellular telephones purchased by [him] which, the parties agree, emit radiation.'" *Id.* at 8-9 (quoting *Verb*, 284 Ill. App. 3d at 469, 672 N.E.2d at 1293).

Second, the Appellate Court thoroughly reviewed the applicable principles of federal preemption and applied them *de novo* to determine the Act's preemptive effect on claims challenging the safety of cellular phones.[1] App. 6. In doing so, the court carefully considered Schiffner's criticisms of the *Verb* opinion, holding that all of them were unfounded:

> On appeal, plaintiff essentially asserts that the *Verb* case was wrongly decided and that the *Verb* opinion failed to address plaintiff's arguments. We disagree. * * * * We find that the *Verb* decision was correctly decided and addressed the legal arguments now presented by plaintiff on the preemption issue. Accordingly, we affirm the dismissal of plaintiff's fourth amended complaint because the state claims are preempted by federal law.

Id. at 6, 14. The Appellate Court distinguished *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), because those cases involved different statutes: "Obviously different statutes, different preemption provisions and different regulations will be interpreted differently. . . . Furthermore, even the same statute can require differing results as to preemption given different underlying facts." App. 11-12.

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[1] Motorola argued below that the Appellate Court should follow *Verb* and affirm the Circuit Court's ruling under principles of *stare decisis*. The court disagreed, and instead elected to examine the dismissal of Schiffner's complaint, and *Verb*, *de novo*. App. 5-6. Thus, the Appellate Court took a fresh look at the preemption issue and concluded, independently, that the Act preempts warnings and labeling claims challenging the safety of cellular portable telephones.

After finding that all of Schiffner's claims were preempted, the Appellate Court went on in *dicta* to find that Schiffner had adequately alleged damages. *Id.* 17. The Appellate Court chose not to address Motorola's third ground for affirming the Circuit Court's decision, which was that each of Schiffner's four claims suffers from one or more independent pleading defects.

REASONS FOR DENYING THE WRIT

In his petition, Schiffner raises the exact issues that the Illinois Supreme Court has twice found not worthy of review — first in 1996 in *Verb*, and again last year in this case. Those issues are no more worthy of review in this Court, for at least four reasons.

First, the ruling in this case presents a very narrow issue because the ruling is, by its very nature, statute-specific. The Appellate Court made clear that its holding was limited to its analysis of the Act *as applied to* the facts alleged in Schiffner's complaint. App. 8-14. Moreover, there have been only *two* decisions in the thirty years since the Act was passed that have addressed its preemptive scope.

Second, the ruling below does not conflict with decisions of any other court. Schiffner suggests that the ruling here conflicts with various decisions that have interpreted supposedly similar preemption provisions in other statutes. Schiffner is wrong. Decisions interpreting preemption provisions in other statutes are irrelevant to the analysis here because, as this Court has held, the touchstone in any preemption analysis is the intent of Congress. *Lohr*, 518 U.S. at 485. Cases interpreting different statutes, with different legislative histories, different purposes, and different statutory frameworks, shed no light on the intent of Congress when it passed the Act at issue here. Indeed, in both *Verb* and this case the Appellate Court so held. App. 11-13; *Verb*, 284 Ill. App. 3d at 470, 672 N.E.2d at 1294. There is not a single reported decision that conflicts with the preemption holdings in *Verb* and in this case.

Third, Schiffner's petition does not merit review because there are independent state law grounds for affirming the ruling below. Each of Schiffner's four claims suffers from one or more substantive pleading defects under Illinois law. In light of its ruling that Schiffner's claims are preempted by federal law, the Appellate Court did not address these individual pleading flaws. Nevertheless, the fact remains that even if Schiffner's claims were not preempted (which they are), his lawsuit would still have to be dismissed because he has failed to plead a cognizable claim. Thus, review of the preemption issue would not change the ultimate result in this case.

Fourth, the ruling below was correct. Although mere error is no basis for this Court to exercise its discretionary review, the fact is that the ruling below rests on settled principles of preemption here, as in *Verb*. The Appellate Court thoroughly analyzed the language of the Act, the purpose of the statute, the statutory framework, and the nature of Schiffner's claims. It found that Schiffner's claims "centered on the lack of warnings as to the safety of and possible health risks caused by cellular phones." App. 8-9. And it correctly concluded that because the Act expressly granted the FDA the exclusive power to prescribe such warnings and performance standards for cellular phones, Schiffner's state law claims were preempted.

I. THE RULING BELOW INVOLVES NO ISSUES OF GENERAL IMPORTANCE THAT MERIT REVIEW.

Schiffner seeks review of an intermediate state appellate decision. The Court's Rules allow for such review when the petition presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Schiffner's petition presents no such issue. The Appellate Court's preemption ruling is by its nature statute-specific and limited to the facts of this case. As this Court has made clear, in analyzing the preemptive scope of a particular statute, courts must take as their touchstone the intent of Congress, as informed by the statutory language, the statutory framework, the legislative history, the purpose of the statute as a whole, and

"the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Lohr*, 518 U.S. at 485-86. Thus, the scope of every preemption decision is typically limited to the particulars of the statute at issue in the case.

The Appellate Court recognized this principle in its ruling below, emphasizing that the key to its preemption analysis is the language and framework of the Act:

> the key inquiry in all preemption cases is the objective or purpose of Congress in enacting the *particular statute*. The doctrine requires courts to examine *the Federal statute in question* to determine whether Congress intended it to supplant State laws on the same subject.

App. 11 (emphasis added in original) (quoting *Verb*, 284 Ill. App. 3d at 467-68, 672 N.E.2d at 1292). As discussed above, the Appellate Court expressly acknowledged the limited application of its holding, noting that courts will interpret different statutes and regulations differently, and that under different facts the same statute may have a different preemptive effect. App. 11-12. Thus, the ruling below is not one that, as a legal or practical matter, will have widespread application.

Schiffner argues that the decision below "will create a morass of inconsistent rulings interpreting the same statutory language." Pet. 6. Not so. First, as the Appellate Court noted, aside from *Verb* there is no other reported decision in the country interpreting or applying the preemption provision in the Act. App. 5. And there has not been a single reported case that has relied on or even cited the Appellate Court's preemption rulings in either *Verb* or *Schiffner*. In short, these rulings are narrow in scope, and there is no need for the Court to grant review here.

II. THE RULING BELOW DOES NOT CONFLICT WITH ANY OTHER DECISIONS.

The Court's Rules also allow for review when the ruling below has decided "an important federal question that in a way that conflicts with" other decisions by lower courts of last resort or "relevant decisions of this Court." Sup. Ct. R. 10(b) & (c). Neither is true in this case.

The ruling below does not conflict with any other decision, let alone a decision of this Court. The only other case that has been decided on this issue anywhere in the country is *Verb*, and it reached the same result for essentially the same reasons. No court has ruled that the Act does *not* preempt the claims asserted here. Because no conflict exists, the Court should deny Schiffner's petition. If in the future any court were to disagree with the Appellate Court's sensible conclusion that the Act preempts claims such as those raised by Schiffner in this case, that ruling would provide an appropriate opportunity to consider whether to address these issues on the merits. But no such justification exists at this time.

Schiffner tries to manufacture a conflict between the ruling below and decisions that have interpreted the preemptive effect of several other federal statutes, including the Federal Noise Control Act, 42 U.S.C. §§ 4901-4918 (1994) ("FNCA"), the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30169 (1994) ("FMVA"), and the Medical Device Amendments, 21 U.S.C. § 360(k)(a) (1994) ("MDA"). *See* Pet. 6-13. He argues that because those statutes supposedly have "similar" preemption provisions, cases holding that those statutes do not preempt certain state law claims conflict with the Appellate Court's decision here. *Id.* at 6. Schiffner's asserted conflicts are illusory because the cited decisions analyzed different statutes, which have different purposes, different statutory structures, and different legislative histories, and which have been implemented by vastly different federal regulatory schemes. *See, e.g., Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973) ("Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of

the federal regulatory scheme in question."). They thus are not dispositive of, or even particularly relevant to, the preemption issues raised in this case under the Act.[2]

III. IN ANY EVENT, INDEPENDENT STATE GROUNDS EXIST FOR AFFIRMING THE RULING BELOW.

Even if the ruling below raised an issue of general importance or a decisional conflict (and it does neither), Schiffner's petition is still unworthy of review because there are other substantive defects in his complaint that defeat his claims. When an independent basis for a decision exists, particularly one that rests on grounds of state law, the Court's discretionary review is not warranted. *See, e.g.*, R. Stern, *et. al.*, *Supreme Court Practice* § 4.12, at 185 (7th ed. 1993) (citing cases for the proposition that the Court will not grant certiorari in cases in which other issues exist that "might alone have served as an adequate ground for disposition of the case").

Each of Schiffner's claims is separately flawed. Schiffner's implied warranty claim (Count I) fails for two reasons: (1) he does not allege he is in privity of contract with Motorola, as required under Section 2-314 of the UCC, *see Board of Educ. v. A. C. & S., Inc.*, 131 Ill. 2d 428, 461, 546 N.E.2d 580, 595 (1989); and (2) he has failed to allege a

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[2] For example, in *Baltimore & Ohio R.R. v. Oberly*, 837 F.2d 108, 113 (3d Cir. 1988), cited by Schiffner (Pet. 11), the court based its preemption ruling on a provision in the FNCA that "primary responsibility for control of noise rests with State and local governments." 42 U.S.C. § 4901(a)(3). No such language exists anywhere in the Act. Similarly, in *Lohr*, 518 U.S. 470, also cited by Schiffner (Pet. 11), the Court based its preemption ruling primarily on FDA regulations interpreting the MDA, which provide that state requirements are preempted "only" when the FDA has established "'specific counterpart regulations or . . . other specific requirements applicable to a particular device.'" *Id.* at 498. No FDA regulations interpreting the Act contain any "specificity" requirements like those promulgated for the MDA. To the contrary, the Act's preemption provision prohibits states from enforcing "*any* standard which is applicable to the same aspect of performance" regulated by the FDA. 21 U.S.C. § 360ss (emphasis added).

product defect. His defect allegations are premised entirely on the theory that cellular phones might hypothetically cause injury or an increased risk of injury.[3] Such speculative defect allegations fail to state a claim under Illinois law. *Verb*, 284 Ill. App. 3d at 472, 672 N.E.2d at 1295. Schiffner's Consumer Fraud Act claim (Count II) is defective because the only alleged misrepresentation Schiffner attributes to Motorola occurred on February 4, 1993 (Cplt. ¶ 20), nearly two-and-a-half years *after* Schiffner purchased his phone. (*Id.* ¶ 11) The Illinois Supreme Court has held that only pre-purchase misrepresentations state a claim under the Consumer Fraud Act. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 502, 675 N.E.2d 584, 594 (1996); *see also Verb*, 284 Ill. App. 3d at 471-72, 672 N.E.2d at 1295-96.

Schiffner's Magnuson-Moss claim (Count III) is derivative of his claims based on breach of the implied warranty. Because, as explained above, Schiffner has not alleged a defect that breaches an implied warranty, his Magnuson-Moss claim fails as well. *See* 15 U.S.C. §§ 2301, 2310(d) (1994); *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1031-32 (N.D. Ind. 1981). Finally, Schiffner's claim for injunctive relief (Count IV) fails because he has not alleged any facts establishing that he has a lawful right to relief, that he has an inadequate legal remedy, or that he will suffer irreparable harm without an injunction. *See Illinois Pure Water Comm., Inc. v. Yoder*, 6 Ill. App. 3d 659, 662, 286 N.E.2d 155, 157 (5th Dist. 1972).[4]

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[3] Schiffner alleges that Motorola sold phones "without adequate guards to shield the user from the EMF radiation" and "without adequate design so as to increase the distance between the user's head and the antenna of the phone." (Cplt. ¶ 39b, d) But Schiffner never alleges why guards or a new antenna design are necessary. He does not, and cannot, allege that EMF from cellular phones has caused injury in general, or to him personally, to warrant any modifications. Therefore, he has not properly alleged a product defect.

[4] Motorola also contends that Schiffner has failed to allege a compensable injury. The Appellate Court in *Verb* held that allegations about loss of value premised on cellular phones being "potentially harmful"

Because these pleading flaws are themselves dispositive under Illinois law, the Court is presented with several alternatives for affirming the rulings below dismissing Schiffner's complaint. The Court should thus deny the petition because its review of the preemption issue would not change the ultimate result in this case.

IV. THE COURT BELOW CORRECTLY HELD THAT SCHIFFNER'S CLAIMS ARE PREEMPTED.

Schiffner's petition is largely devoted to an argument that the Appellate Court erred. While such error does not itself provide an adequate basis for discretionary review, the simple fact is that the ruling below on preemption is correct.

A. Federal Preemption Standards

Federal preemption may be either express or implied and "'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Where, as here, a statute contains a preemption provision, the Court "need not go beyond that language to determine whether Congress intended [the statute] to pre-empt at least some state law." *Lohr*, 518 U.S. at 484.

Federal regulations have the same preemptive effect as federal statutes, *Fidelity*, 458 U.S. at 152-53, and a federal agency's affirmative decision *not* to regulate can have the same preemptive effect as a promulgated regulation, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). This Court has

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are pure speculation and conjecture, and do not state a claim under Illinois law. *Verb*, 284 Ill. App. 3d at 472, 672 N.E.2d at 1295. While the Appellate Court in *Schiffner* found that his allegations do state a claim, Motorola believes that the Illinois Supreme Court would follow *Verb* and dismiss Schiffner's claims for failure to allege a compensable injury. This presents yet another potential state law ground for affirming the decision below.

recently reaffirmed that damages actions brought under state common law, including state tort law, may be preempted to the extent they conflict with federal regulation. *Lohr*, 518 U.S. at 502-04.

B. Congress Gave The FDA Exclusive Authority Over Safety Regulations For Products That Emit Radiofrequency Energy, Such As Cellular Phones.

The Appellate Court held that Congress gave the FDA the exclusive power to regulate products that emit radiation, and thus "'it is irrelevant whether the FDA has not set any standards, as plaintiff[] allege[s], because the power to do so nonetheless resides with the FDA.'" App. 10 (quoting *Verb*, 284 Ill. App. 3d at 469, 672 N.E.2d at 1293). The statutory framework of the Act supports that conclusion. The Act imposes an affirmative obligation upon the FDA to determine what, if any, regulations or warnings are appropriate for products that emit radiation. Among other things, the FDA is required to:

- develop and administer performance standards for electronic products (21 U.S.C. § 360ii(a)(1));
- coordinate and conduct research and studies to minimize the exposure of persons to unnecessary electronic product radiation (*id* § 360ii(a)(2));
- coordinate with other federal and state agencies to gather information about electronic product radiation and to develop performance standards to control radiation emissions (*id.* § 360ii(a)(3) & (6)); and
- study and evaluate emissions of product radiation, and develop and test procedures and techniques to minimize exposure to electronic product radiation (*id.* § 360ii(a)(4) & (5)).

The Act's preemption clause prohibits a state from establishing any standard for an electronic product that "is not identical to the Federal Standard." *Id.* § 360ss. Taken together, these provisions confirm that Congress vested exclusive authority in the FDA to regulate products such as cellular phones.

Moreover, the FDA *has* exercised its authority to regulate cellular phones in two respects.

First, as noted above, the FDA is required by the Act (*id.* § 360ii(a)(3) & (6)) to coordinate with other federal agencies in the "development of performance standards pursuant to Section 360kk of [the Act] to control[] radiation emissions." *Id.* § 360ii(a)(6). The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370d (1994), requires federal agencies, such as the Federal Communications Commission, to evaluate the effects of their actions on the quality of the human environment. Pursuant to the NEPA, the FCC, in consultation with the FDA, has reviewed the need to regulate human exposure to RF radiation from FCC-regulated transmitters and facilities, including cellular phones. In 1985, the FCC adopted standards developed in 1982 by the American National Standards Institute and the Institute of Electrical and Electronics Engineers, Inc., which limit RF radiation exposure. *See* 47 C.F.R. §§ 1.1301-.1307 (1997). Thus, the FCC, in coordination with the FDA, has adopted regulations applicable to cellular phones. Because the statutory scheme expressly requires the FDA to work in coordination with other federal agencies, the FCC standards are tantamount to FDA standards for purposes of implementing the Act. Indeed, the FCC's updated regulations confirm this conclusion and expressly state that they represent an *official consensus* of the federal health and safety agencies, including the FDA, on radiofrequency exposure limits. *In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 61 Fed. Reg. 41006, 41007 (August 7, 1996).

Second, in response to the very issues that gave rise to this lawsuit, the FDA in 1993 again revisited the issue of human exposure to RF energy emitted by cellular phones. After reviewing the relevant scientific evidence, the FDA expressly concluded there was *no basis* for issuing any additional performance standards applicable to cellular phones beyond the standards put into effect by the FCC in 1985. As the FDA explained at that time:

> [B]ecause the phones emit radiofrequency energy, the agency could impose certain restrictions if health problems were to arise after marketing. For example, FDA could impose a performance standard on the manufacturers of these products if the scientific evidence showed a public health need. Such a standard might require that the phones emit radiofrequency energy below a certain level. *Existing scientific data do not justify FDA's taking this action.*

FDA Talk Paper No. 793, *Update on Cellular Phones* (Feb. 4, 1993) (emphasis added). This considered decision by the FDA not to issue any additional performance standards itself constitutes an affirmative regulatory action, especially because the Act *requires* the FDA to issue performance standards *if* it determines that such standards are necessary to protect the public health. 21 U.S.C. § 360ii(a)(1). Thus, Schiffner's suggestion that the FDA has failed to act on this issue is misleading at best. Pet. 8. The FCC has acted in conjunction with the FDA and other pertinent federal agencies, and this fact, taken together with the FDA's express conclusion that no further regulation is necessary, preempts Schiffner's claims. *See Ray*, 435 U.S. at 178 (depending on the precise statutory and regulatory scheme, an agency's decision not to regulate can have the same preemptive effect as an affirmative regulation). Thus, contrary to Schiffner's implication that the FDA has not addressed the issue, the broader context of federal regulation in this area supports the conclusion that his claims are preempted.

In its ruling below, the Appellate Court independently examined the Act's preemption provision, statutory framework, and legislative purpose, and then agreed with the *Verb* court that Congress vested exclusive authority in the FDA to establish standards of safety and warnings for cellular phones. It thus properly concluded that Schiffner's warnings and labeling claims are impliedly preempted.

C. Schiffner's Attacks On The Ruling Below Lack Merit.

Schiffner makes three complaints about the ruling below. First, he erroneously argues that the Act preempts his claims only if a specific standard issued by the FDA is in effect, citing *Myrick*, 514 U.S. 280. Pet. 6. He contends that because the language of the preemption provision in the statute at issue in *Myrick* is "similar" to the Act's preemption provision, *Myrick* should control here. Second, he argues that the Appellate Court erred by considering the general purpose of the Act rather than confining its analysis solely to the preemption provision. Third, he argues that the Act's savings clause preserves his claims. None of these arguments has merit.

1. *Myrick* Has No Relevance To This Case.

In *Myrick*, plaintiffs claimed that the defendants negligently failed to equip their trucks with anti-lock brake systems ("ABS"). The defendants argued that the FMVA preempted plaintiffs' claims because there was no federal standard requiring ABS in trucks. The Court held that there was no express preemption because there were no federal regulations in effect. Although the applicable federal agency — the National Highway Transportation Safety Administration — had originally issued regulations that required trucks to have ABS, a court had suspended the regulations. Thus, the lack of a standard for ABS "stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations," as opposed to an affirmative agency decision not to regulate. *Myrick*, 514 U.S. at 286-87. In addition, the Court reviewed the structure and purpose of the FMVA and held that Congress did not intend for NHTSA to have "all authority over the regulated area," and thus the FMVA did not impliedly preempt plaintiffs' claims. *Id.* at 286.

Schiffner's reliance on *Myrick* is misplaced for several reasons. As discussed above, *Myrick* involved a different statute (the FMVA) that has a different purpose, a different statutory framework, and a different legislative history from the

Act. And the Court applied the FMVA to a different set of substantive facts and allegations than are at issue here. Thus, the Court's decision in *Myrick* would be unlikely to have any direct relevance to the claims raised in this case, which involve no allegations of personal injury. Moreover, the distinctions that flow from different statutory and regulatory schemes gave rise to the two particular reasons why the Court in *Myrick* was able to distinguish earlier decisions like *Ray*, in which the Court had held that the governing federal agency's affirmative decision not to regulate would suffice to preempt any state regulation. First, the statute in *Myrick* was viewed as not being intended to centralize all such authority in NHTSA, 514 U.S. at 286, whereas here the Appellate Court determined that Congress intended "to relegate the authority to a federal agency to enact, where appropriate and approved, uniform national standards." App. 10 (citing *Ray* and distinguishing *Myrick*). Second, the lack of agency standards in *Myrick* resulted from the Ninth Circuit's suspension of previously issued regulations, *not* from an affirmative decision not to regulate. *See* 514 U.S. at 286-87. By contrast, the lack of FDA performance standards here results from the FDA's affirmative decision finding it unnecessary to supplement existing FCC regulation of cellular phones with additional measures of its own. *See supra* Section IVB (discussing regulatory background under the Act).

The FDA's affirmative decision not to adopt further regulations governing cellular phones preempts Schiffner's claims. *Ray*, 435 U.S. at 178. The Appellate Court was correct here to conclude that the preemption issues under the Act are controlled by *Ray* rather than *Myrick*, and in any event this reasonable determination does not merit review here.

2. The Appellate Court Properly Considered Congress' Purpose In Passing The Act.

Schiffner concedes, because he must, that it is a court's duty in every preemption analysis to determine the intent of Congress in passing the statute at issue. Pet. 9. Remarkably, however, Schiffner then takes the Appellate Court to task for doing just that and relying on the Act's "general purpose" clause in its preemption analysis. *Id.* at 13-14. This argument

is not only inconsistent, but is just plain wrong. This Court has repeatedly held that courts are obligated to consider not just a statute's preemption clause, but also the statute's "structure and purpose" as a whole. *Lohr*, 518 U.S. at 486. Thus, the Appellate Court's review of the Act's general purpose clause was entirely appropriate.

3. The Savings Clause In The Act Does Not Preserve Schiffner's Claims.

Schiffner's attempt to salvage his claims by pointing to the Act's so-called "savings" clause is futile. Such provisions "may not . . . preserve a state law or regulation which conflicts with the objective of a federal law, even if it is possible to comply with both." *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1582 (M.D. Ga. 1991). Thus, a general savings clause for claims asserted under state common law and statutory law does not "purport to preclude pre-emption of state law by other provisions of the Act." *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause") (citation omitted).

The Act's savings clause expressly states that it is *not* applicable if an action is preempted under the preemption provision contained in Section 360ss. 21 U.S.C. § 360pp(e) ("Except as provided in the first sentence of Section 360ss of this title . . . ."). Because Schiffner's claims would conflict with the FDA's affirmative regulatory decisions — made both within its exclusive statutory authority and in coordination with other federal agencies as provided by the Act — about how much federal regulation to provide on human exposure to RF radiation from cellular phones, they are not preserved by the savings clause. *See, e.g., Ouellette*, 479 U.S. at 493.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: February 8, 1999

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I.

THE FDA'S DISCUSSION OF RISKS FROM EMF RADIATION EVIDENCES APPROVAL OF STATE REGULATION 1

II.

MOTOROLA WAIVED UNRAISED ARGUMENTS OF "OTHER GROUNDS" FOR DISMISSAL BY NOT RAISING THEM IN THE TRIAL COURT 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases PAGE(S)

American Airlines v. Wolens, 513 U.S. 219 (1995) 5

In re Ford Motor Company Bronco II Products Liability Litigation, 909 F. Supp. 400 (E.D. La. 1995) 3

Haudrich v. Howmedica, Inc., 169 Ill. 2d 525 (1996), *rehearing denied, certiorari denied*, 117 S.Ct. 274 (1996) 5

Hillsborough County, Florida v. Automated Medical Labs., Inc., 471 U.S. 707 (1985) 2

Verb v. Motorola, 284 Ill. App. 3d 460 (1st Dist. 1997) 1, 3

Statutes

21 U.S.C. §kk 4

Other Authorities

FDA Talk Paper No. 793, *Update on Cellular Phones, February 4, 1993* 2

In the Matter of Guidelines for Evaluating the Environmental Effects of Radio Frequency Radiation, FCC 96-326, 61 Fed. Reg. 41006 (Aug. 7, 1996) 3, 4

R. Stern, *et al., Supreme Court Practice* §3.24 (7th edition, 1993) 6

ARGUMENT

Motorola raises new arguments in its Brief in Opposition to Schiffner's Petition ("Opp."). Those points have been argued below and the Appellate Court did not find sufficient merit in them to even mention them in passing. Because of the importance Motorola places in their positions, and their potentially misleading effect, Petitioner makes this short reply.

I.

THE FDA'S DISCUSSION OF RISKS FROM EMF RADIATION EVIDENCES APPROVAL OF STATE REGULATION.

Motorola's argument that a FDA "Talk Paper", issued on February 4, 1993, supports preemption of the concerned marketing, misrepresentation and consumer claims (Opp. at 15), demonstrates its misunderstanding or misrepresentation of preemption. Any contention that the FDA intended that its nonregulation of performance aspects of cellular portable telephones in 1993 constituted an affirmative decision that no regulation at all was permitted is not supported by the language of the talk paper itself, by existing law, or by reference to statements of sister agencies. Reference to the talk paper, as Motorola has made, is questionable as the complained-of transaction took place in 1990, three years before the talk paper was issued.

The talk paper was cited by Motorola in the lower courts, as well as argued in *Verb v. Motorola*, 284 Ill. App. 3d 460 (1st Dist. 1997), and has failed to convince any judge that it was a statement that the FDA had made a preclusive and preemptive decision that no

regulation of cellular portable phones was necessary. The talk paper discusses concerns over potential problems surrounding radiation emitted by cellular portable phones. The FDA states, in a question and answer form, that there is evidence that suggests that low level radiation (cellular portable phone frequencies) may cause adverse health effects. FDA Talk Paper No. 793, *Update on Cellular Phones, February 4, 1993.* In fact, the FDA states that:

> Nonetheless, we cannot dismiss the studies as irrelevant to cellular portable phone users. We simply don't have enough information at this point to rule out the possibility of a risk.

The FDA also notes that it was its position that there was not enough evidence to know for sure either way and that the necessary human studies did not exist at that time. *Id.*

This is a far cry from a federal agency making an affirmative decision that no regulation is necessary on any level. Preemption of state law claims as a result of an agency decision not to act would destroy our system of federalism. *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 717 (1985).

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intention clear if they intend for the regulations to be exclusive.

Id. at 718.

Where the lack of a federal standard results from a preliminary observation that insufficient data exists to

justify regulation, as is the case here, a court should not imply an intent to preempt by non-regulation. *See In re Ford Motor Company Bronco II Products Liability Litigation,* 909 F. Supp. 400, 408 (E.D. La. 1995). Additionally, where the referenced agency acknowledges the possibility of a risk, but takes no position, other avenues of redress for the public such as access to the common law and state statutes should not be eliminated.

Reference to the FCC non-regulation of cellular portable phones further demonstrates the inaccuracy of Motorola's "exclusivity" argument. The FCC also has some regulatory authority over cellular portable phones.[1] In 1996, the FCC issued a report and order titled, *In the Matter of Guidelines for Evaluating the Environmental Effects of Radio Frequency Radiation*, FCC 96-326, 61 Fed. Reg. 41006, 41007 (Aug. 7, 1996). The FCC, as contemplated by *Hillsborough County*, expressly stated its position on federal preemption, stating:

> In the past, parties have requested that the Commission preempt state and local authority over RF exposure matters. To date the Commission has declined to preempt on health and safety. However, the Commission has noted that

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[1] That the FCC has any authority to regulate aspects of cellular portable phones eviscerates Motorola's and the Appellate Court's position that the "exclusive" power to regulate cellular phones rests with the FDA. In fact, Motorola argued in *Verb v. Motorola*, 284 Ill. App. 3d 460, that the claims there were preempted by the FCC, a position expressly rejected by the *Verb* Court. Motorola concedes the FCC has regulatory power over "health and safety" by its reliance on the FCC report and order, yet boldly contends that the FDA's power in this area is somehow "exclusive." Compare Opp. at 13 with Opp. at 14.

> should non-Federal RF radiation standards be adopted that adversely affect a licensee's ability to engage in Commission authorized activities, the Commission would consider reconsidering whether Federal action is necessary.

FCC Report and Order 96-326 at par. 164 (footnotes omitted). This non-preemption position was based upon the Commission's hesitation to intrude on the ability of states to make regulations regarding health and safety, *id.* at par. 166, and a traditional reluctance to preempt state regulations enacted to promote health and safety. *Id.* at par. 167.[2] The FCC report and order demonstrate why the mere existence of the Environmental Products Radiation Control Act, 21 U.S.C. §kk ("EPRCA"), does not preempt these claims and how the FDA could have and should have addressed the issue if it intended to preempt these claims.

Moreover, Motorola does not accurately state the nature of the claims brought by Schiffner. These claims are concerned with the marketing and sale of the cellular portable phone purchased by Schiffner. His damages are economic; he is not claiming any personal injury. His breach of warranty and Magnuson-Moss claims concern the terms of the contract for sale between him and Motorola. The most expansive preemption laws do not preempt the contract action seeking to

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[2] In fact, the FCC expressly wrote to plaintiff's counsel stating that its regulations did not preempt state law. "[T]he Commission has not at this time preempted the exercise of additional state law remedies premised on individuals' exposure to levels of RF radiation." Fourth Amended Complaint at Exhibit 6.

enforce the bargain between the parties. *See American Airlines v. Wolens*, 513 U.S. 219 (1995).

II.

MOTOROLA WAIVED UNRAISED ARGUMENTS OF "OTHER GROUNDS" FOR DISMISSAL BY NOT RAISING THEM IN THE TRIAL COURT.

In its effort to sway this Court from addressing the impact of the ruling below on fundamental preemption doctrine, Motorola goes to great lengths to claim that there are other state law grounds supporting dismissal of Schiffner's complaint. Opp. at 10-11. While Schiffner disputes Motorola's position, Motorola has waived these points for review. Clearly, the Appellate Court did not address these arguments by Motorola because they were raised for the first time on appeal and were never made in the trial court. The only grounds raised by Motorola in the trial court were preemption and compensable injury and those are the matters which form the basis of the Appellate Court opinion. This Court should not be the forum for Motorola to first present its demurrer.[3]

Under Illinois law, new grounds for dismissal may not be raised for the first time in the appellate court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536-40 (1996), *rehearing denied, certiorari denied,* 117 S.Ct. 274 (1996). The Illinois courts can and will deal with any remaining issues of state law in this case once it is

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[3] Even were Motorola correct, which it is not, the trial court could allow an amendment of the pleadings to correct pleading deficiencies.

remanded. *See* R. Stern, *et al., Supreme Court Practice* §3.24 at p. 157 (7th edition, 1993). (State law questions will be remanded for consideration by the state court.)

Moreover, Motorola wrongly relies on, *Supreme Court Practice*. Opp. at 10. The "Important Constitutional Issues" section Motorola cites hardly applies to the situation here where the case was decided on federal law and where the appellate court upheld the state law basis for the causes of action. Notably, Motorola cites no case even remotely similar to the procedural setting presented here. The treatise does, however, support the grant of *certiorari*. In the jurisdictional section discussing "Adequacy of State Grounds", the authors note that the purported state ground must be a tenable one.

> . . . Supreme Court review cannot be evaded by reliance on a state ground so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question.

Id. at §3.24 p. 153. Motorola's arguments are such a device seeking to avoid review of the federal question clearly framed by the Appellate Court ruling. Motorola cites nothing in *Supreme Court Practice* which is a reference to the procedural posture here, where the state court has decided the case on only federal grounds and upheld the validity of the state claims. Presently, the opinion below eliminates the validly stated claims of Petitioner, and the putative class he seeks to represent, through the FDA's alleged "exclusive" right to regulate.

CONCLUSION

For the reasons stated herein and those in the Petition, Petitioner respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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